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1 Jesse Aron Ross2 HOSP-P.O. box 6503 Indian Springs NV.4 89070 #1095756

5
6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

8 Jesse Aron Ross,9 Plaintiff,10 -VS-

11 Brian Sandover et al.,
12 Defendants

CASE NO:

2:17-cv-02386-APG-GWF

*Oral Argument Requested

*MOTION In Limine

to waive NRS 41A-071 requirement,

and permission to present

certain claims, in relation to
the evolving standards of decency
Doctrine.

19 Comes now above named Plaintiff, appearing pro-se, and
20 incarcerated, to respectfully move this court to waive NRS 41A-071
21 requirement and permit Plaintiff to present certain claims, in relation
22 to the evolving standards of decency doctrine. This motion is
23 Based upon the Papers and Pleadings on File, the Attached memo
24 of Points and Authorities, and any oral argument permitted at
25 the hearing of this matter. The defendants HAVE BEEN
26 served, see Certificate of Service.

27 Memorandum of Points & Authorities
28

1 I. Procedural History - Abbreviations

2 (i) On 09-25-17, Plaintiff submitted the operable
3 civil complaint in this case. First Amended complaint.

4 (ii) Abbreviations

5 (A) NEVADA Department of Corrections "NDOC"

6 (B) High Desert State Prison "HDSP"

7 (C) medical Delivery System "MDS"

8 (E) First Amended Complaint "FAC"

9 (F) INFOrma PAuPeris "IFP"

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II. Issues

(i) NRS 41A.071 Requires any civil complaint filed
Against a medical Practitioner be Accompanied with
an Affidavit of malpractice from a physician who Practices
a similar Form of medicine as the practitioner being
Sued, if the action sounds in Professional malpractice

(ii) NRS 41A.100 Allows for certain exceptions to
the Affidavit requirement for cases of res ipsa
Loquitur, none of which Apply here.

(iii) Any suit Filed without the NRS 41A.071 Affidavit is
Void Ab initio.

(iv) IN Plaintiff "FAC" there are three Allegations
of medical malpractice, see "FAC" counts 2, 4, and

1 Count 18, which Do Not have the required Affidavit.
 2 (V) Plaintiff is A Pro-se - incarcerated indigent
 3 Litigant, unable to obtain the required Affidavit due
 4 to incarceration and indigency.

5 (VI) Generally speaking verbal harassment does not
 6 violate the 8th Amendment proscription on cruel and
 7 unusual punishment.

8 (VII)

9 III Rule

10 NRS 41A.071; NRS 41A.800

11 Bounds-v-Smith 430 U.S. 817 97 S.Ct. 1491 (1977)

12 Lewis-v-Casey 518 U.S. 343 116 S.Ct. 2174 (1996)

13 Estelle-v-Gamble 429 U.S. 97 97 S.Ct. 285 (1976)

14 Foster-v-Runnels 554 F.3d 807 9th Cir. 2009

15 Whitley-v-Albers 475 U.S. 312 106 S.Ct. 1078 (1986)

16 Hernandez-v-Denton 861 F.2d 1421 9th Cir 1988

17 Austin-v-Terhune 367 F.3d 1167 9th Cir 2004

18 Wood-v-Beauchair 692 F.3d 1041 9th Cir 2012

19 Oltarzewski-v-Ruggiero 830 F.2d 136 9th Cir (1987)

20 IV. Analysis.

21 A. NRS 41A.071 Affidavit

22 NRS 41A.071 requires All civil Actions, Against A
 23 medical Provider, For malpractice, be Filed with an Affidavit
 24 From a medical Provider stating the Alleged Torts, Amount
 25 to Professional malpractice. Any Action Filed without
 26 the Statutorily required Affidavit is void Ab initio.

1 Plaintiff is pro-se-incarcerated and indigent, As
 2 evidenced By Plaintiff "FAC" and "IFP" on File.

3 Therefore NRS 41A.071 is unconstitutional AS
 4 it Applies to This case and this Plaintiff.

5 NRS 41A.071 is Voidable, Absent the state

6 MAKing an alternative means For Plaintiff to access the courts.

7 Plaintiff has a Constitutionally guaranteed right to Access

8 the courts (see Lewis-v-Casey 518 U.S. 343 at 346 116

9 S.Ct 2174 (1996) Furthermore the state not only has A

10 duty to abstain from tortious interference to the courts,

11 that is the prisoners right to Access, But the Supreme court

12 requires the State of Nevada to Affirmatively take steps,

13 to Assure prisoners have meaningful Access to the courts

14 see Bounds-v-Smith 430 U.S. 817 at 824 ⁹⁷ 116 S.Ct 1491

15 (1977). The right to meaningful Access does not exist in

16 "Abstract Freestanding Form" Lewis 518 U.S. at 351. The right

17 is ancillary to an underlying claim without which Plaintiff

18 cannot have suffered injury by being shut out of court.

19 To put it differently No harm no Funl. The requirement

20 that a Plaintiff have suffered an actual injury is

21 Jurisdictional and cannot Be waived. (Lewis 518 U.S. at

22 349). In Bounds the court held that "Prisoner inmate

23 has a constitutional right of Access to the courts to

24 Assert such Procedural and substantive rights as may

25 be Available to him under state and Federal Law (see

26 Bounds 430 U.S. at 833). In the case At BAR, Plaintiff

27 is Blocked From redress by an Arbitrary

1 State Statute. (NRS 41A-071). No Doubt this Statute
 2 is in effect to curb vexatious and meritless
 3 Litigation. Certainly important. However, should this
 4 Court Allow Plaintiff to Proceed with the requisite
 5 Affidavit, The States Goals are still Achieved,
 6 By the Applicable PLRA, which requires the Judge,
 7 an expert in the Law, to dismiss ~~meritless~~
 8 vexatious and meritless cases. See 28 USC §
 9 1915(A). To Allow A tortfeasor immunity from suit
 10 due to his victims inability to pay a medical provider
 11 for an Affidavit is Not Fair. Pro-se-Incarcerated-IFP
 12 Litigants Are NOT on the same grounds as Free world
 13 Litigants. They don't have access to the money needed
 14 to obtain the Affidavits. Actually Plaintiff need not
 15 explicate the disparities between A incarcerated VS-
 16 Free world Litigant, As the Court is surely cognizant.
 17 Judicial restraint and caution is Absolutely necessary
 18 When it comes to voiding A State statute, when a statute
 19 is so clearly unconstitutional it is the within the courts
 20 discretion to name the offending Statute voidable.
 21 One of the only sources for accountability is the
 22 Civil Justice system. If there is no Accountability
 23 Then no one is safe. Any unnecessary Limits on
 24 Access to Accountability through the courts leaves
 25 Every American at Risk.

1 Finally Plaintiff has shown an underlying claim, namely
 2 A well Pled Prima Facie medical malpractice claim(s),
 3 Plaintiff has shown an unconstitutional bar to access the court,
 4 and the injury sustained is the dismissal of meritorious claims,
 5 which ought to be Adjudicated upon their merits in accord
 6 with the 7th Amendment to the U.S. Constitution.

7
 8 B. COUNT 183 "FAC" As it Applies to evolving Standards
 9 of Decency Doctrine.

10
 11 In Count 183 of Plaintiff's "FAC" Plaintiff Alleges
 12 "Sexual Harassment; verbal abuse, psychological abuse, A
 13 violation of the 8th Amendment to the U.S. Constitution.
 14 (See Plaintiff "FAC" on File, Page 6-N.).

15 The Constitution is not a ~~static~~ State document. The
 16 Constitution evolves through Judicial interpretation as
 17 our Society evolves. (Compare Plessy-v-Ferguson 163 U.S.
 18 537 [1896] to Brown-v-Board of Education of Topeka
 19 347 U.S. 483 [1954]; Scott-v-Sandford 60 U.S. 393 [1857]
 20 to the 13th & 14th Amendments; more recently Austin-v-Techumne 367
 21 F.3d 1167 9th Cir. 2004 to Wood-v-Beauchair 692 F.3d 1041
 22 9th Cir 2012).

23 In Fact the Supreme Court of the United States Aptly
 24 observed over 40 years ago:

25 "The eighth Amendment embodies broad and idealistic
 26 concepts of dignity, civilized standards humanity and
 27 decency - - - Thus we have held repugnant to the

1 to the eighth amendment Punishments which are
 2 incompatible with the evolving standards of decency
 3 that mark the progress of a maturing Society" (Estelle-v-
 4 Gamble 429 U.S. 97 at 259 97 S.Ct. 285 [1976]).

5 IN ~~Estelle-v-Gamble~~ Oltarzewski-v-Ruggiero
 6 830 F.2d 136, 139 9th Cir (1987), it was held that
 7 Verbal harassment is not sufficient to state a claim).

8 And in 2004 sexual harassment was held not
 9 actionable under A § 1983 claim. But the 9th Cir. in
 10 2012 found that standards of decency had evolved, that
 11 sexual harassment in fact violated the 8th Amendment's
 12 proscription on cruel and unusual punishment, primarily
 13 because there is no conceivable legitimate penological
 14 interest served in sexually harassing prisoners. Now
 15 30 years after Oltarzewski, Plaintiff contends that
 16 evolving standards of decency now prohibit the
 17 unnecessary verbal and psychological abuse of prisoners,
 18 as the combination are toxic to the human spirit. There is
 19 no legitimate penological interest served. In fact the
 20 "NDOC" recognizes this in Administrative regulation 339
 21 which specifically prohibits sexual and verbal abuse.

22 In Howard-v-Cornett Case No: 2:11-cv-01402-APG-
 23 GWF 2014 U.S. Dist Lexis 19231 His Honor stated "The
 24 eighth Amendment prohibits officials from inflicting cruel and
 25 unusual punishment upon prison inmates; The key inquiry is not
 26 the nature of the inmates injury, But the reason for inflicting
 27 that injury. The courts deference to prison

1 Administrators ----- does not insulate from
 2 review Actions taken in Bad Faith" pg 14.
 3 There of course will be times where aggressive
 4 Verbal Commands are necessary to restore order, or
 5 for prophylactic purposes, But those are not the
 6 instances Plaintiff has filed suit over. Instead
 7 Plaintiff has provided DATE, times and locations where
 8 Sexually derisive comments have been made, threats,
 9 Attempts by Senior officers to escalate situations into
 10 Combat, and the ongoing systematic Psychological
 11 Abuse of Plaintiff, which is a combination of Verbal
 12 and Physical micro-aggressions directed at Plaintiff
 13 exacerbating his Anxiety disorder/Attacks and
 14 Night terrors. There is a fundamental Principal in
 15 our Society, Law enforcement officers are held to
 16 a higher ethical standard than the Average citizen. If a
 17 Prisoner at "HDSB" were to sexually harass, verbally or
 18 psychologically Abuse an officer, the following would ensue;
 19 First the offending Prisoner would be beat to a pulp, then
 20 his personal property would be destroyed, then he would
 21 be put in solitary with A write, Plaintiff has seen
 22 Just that. So Prisoners are held to a higher ethical
 23 Standard than the police officers. Prisoners do not
 24 get alot of sympathy from Society, but it is not
 25 Sympathy Plaintiff is asking for it is humanity,
 26 decency that mark a mature Society. The
 27 verbal and psychological abuse, are precursors to

1 Physical and sexual Abuse. And, at least as
 2 it pertains to this case there is no legitimate penological
 3 purpose served. In fact it is counter-productive to
 4 the public interest. The "NDOC" is creating mean and
 5 angry people and then releasing them on the community.
 6 Drug Addicts, Property offenders (who enter "NDOC") who
 7 have no violent history are subject to ongoing Abuse
 8 by these officers. Not only does this prevent the rehabilitation
 9 of errant behavior, it encourages and promotes a
 10 hostile living environment and violence. Just recently
 11 officers shot and killed (and maimed another prisoner)
 12 a prisoner in full restraints. Therefore Plaintiff has
 13 ϕ Standing because this behavior presents an imminent
 14 (not hypothetical or conjectural) threat to Plaintiff's physical
 15 safety. ~~an~~ Eventually a officer is going to go to
 16 far and Plaintiff's very life may be in peril. The
 17 key inquiry is (as this court suggested in Howard)
 18 "the reason for inflicting that injury", what is the
 19 reason for the systemic verbal/psychological Abuse?
 20 Plaintiff puts forth that it is sadistic and malicious.
 21 Plaintiff is not asking for an adjudication of the merits,
 22 just that this Court allow Court 18 to survive
 23 screening, so Plaintiff can flesh out during the
 24 discovery process the extent of the problem, so
 25 Plaintiff ~~can~~ can present evidence that the conduct
 26 complained of, is no longer the price prisoners pay as
 27 a part of their incarceration

1 Prisoners are sent to prison As a punishment
 2 NOT to be punished and tortured. (and to
 3 rehabilitate, deter crime, and protect society of course).
 4

5 V. Conclusion

6 Therefore, Plaintiff respectfully requests the court Allow
 7 Plaintiff "FAC" counts 2, 4, 13, 18 survive the 28 USC
 8 Section 1915(A) Screening. The Defendants can always File
 9 a demurrer/ Plea in abatement/ Rule (FRCP) 56 motion. Plaintiff
 10 has served the defendants a copy of this motion even
 11 though they have not yet been served, Just to be fair.

12 Respectfully,

13 *Jesse Ross*

14 I Jesse Ross declare under penalty of perjury, the foregoing
 15 is true and correct to the best of my personal knowledge
 16 Per 28 USC § 1746 NRS 53.045

17 09-29-17

18 Signed At Clark County NV.

Jesse Ross

Jesse Ross

19
 20 I served a true and correct copy to the defendants through
 21 Intra-departmental mail at "HOSP" Addressed to the
 22 Defendants, By depositing a copy in the institutional mail
 23 reception in Unit 11-C-2 on 09-30-17.

24 Signed on 9-30-17

25 at Clark County NV.

Jesse Ross

Jesse Ross #1095756

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Case No 2:17-cv-02386-APG-GWF

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